



**Republic v Zachariah & 2 others (Anti-Corruption Case  
35 of 2011) [2020] KEMC 11 (KLR) (16 October 2020) (Judgment)**

*Republic v John Moguche Zachariah & 2 others [2020] eKLR*

Neutral citation: [2020] KEMC 11 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
ANTI-CORRUPTION CASE 35 OF 2011  
LN MUGAMBI, CM  
OCTOBER 16, 2020**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOHN MOGUCHE ZACHARIAH ..... 1<sup>ST</sup> ACCUSED**

**THOMAS MOTURI OYUNGE ..... 2<sup>ND</sup> ACCUSED**

**BINLAW CONSTRUCTION COMPANY LIMITED ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The 1<sup>st</sup> accused, John Moguche Zachariah, 2<sup>nd</sup> accused Thomas Moturi Oyunge and 3<sup>rd</sup> accused Binlaw Construction Company Limited, were arraigned before this Court on 1<sup>st</sup> September, 2011 to answer to the following charges:

**Count I Making a false document contrary to section 345 as read with section 347 (b) and section 349 of the Penal Code, Chapter 63, Laws of Kenya.**

2. This charge was directed at the 1<sup>st</sup> and 2<sup>nd</sup> accused, John Moguche Zachariah and Thomas Moturi Oyunge. The particulars being that on unknown date between the 31<sup>st</sup> day of October, 2002 and 17<sup>th</sup> day of April 2009 at unknown place in Nairobi within Nairobi Area, with intent to defraud, jointly made a false document, to wit, an arbitration award by altering the said arbitration award without the authority of the arbitrator Eng. Joseph Theophil Thuo to the effect that Binlaw Construction Company Limited was awarded a sum of Kshs. 97,176,206 with interest at 28% per annum.



**Count II Uttering a false document with intent to defraud contrary to section 353 of the Penal Code Chapter 63 Laws of Kenya.**

3. This count was directed to the 1<sup>st</sup> and the 3<sup>rd</sup> accused, John Moguche Zachariah and Binlaw Construction Company Limited. The particulars being that on 7<sup>th</sup> April, 2009 at the High Court at Nairobi, Milimani Commercial Courts in Nairobi within Nairobi Area, with intent to defraud knowingly uttered a false document, to wit, an arbitration award purported to have been issued to Binlaw Construction Company Limited against the Office of the President by Eng. Joseph Theophil Thuo to the Deputy Registrar, High Court of Kenya at Nairobi, Milimani Commercial Courts in Nairobi Miscellaneous Civil Application No. 237 of 2009.

**Count III Attempt to commit a corruption offence contrary to section 47A (1) of the Anti-Corruption and Economic Crimes Act, Number 3 of 2003.**

4. This offence is directed at all the three accused, 1<sup>st</sup> accused, John Moguche Zachariah; 2<sup>nd</sup> accused, Thomas Moturi Oyunge and the 3<sup>rd</sup> accused, Binlaw Construction Company Limited. The particulars being that on unknown dates between March, 2009 and 5<sup>th</sup> March, 2010 in Nairobi within Nairobi Area, with intent to commit an offence of corruption, to wit, fraud, jointly attempted to obtain from the Permanent Secretary Ministry of Special Programmes Kshs. 294,443,904 by falsely pretending that the arbitration award that they relied on to secure a court decree at the High Court of Kenya at Nairobi Commercial Courts in Nairobi High Court Miscellaneous Civil Application Number 237 of 2009, was a valid arbitration award issued by Eng. Joseph Theophil Thuo, a fact they knew to be false.

**Alternative Charge to Count III Attempt to obtain by false pretenses contrary to section 313 as read with section 389 of the Penal Code, Chapter 63, Laws of Kenya.**

5. This offence was directed to all the three accused, 1<sup>st</sup> Accused-John Moguche Zachariah, 2<sup>nd</sup> Accused-Thomas Moturi Oyunge and the 3<sup>rd</sup> accused-Binlaw Construction Company Limited.
6. The particulars being that on various dates between 26<sup>th</sup> May 2009 and 5<sup>th</sup> March 2010 in Nairobi within Nairobi Area, with intent to defraud, jointly attempted to obtain from the Permanent Secretary Ministry of Special Programmes Kshs. 294,443, 904 by falsely pretending that the arbitration award they relied on to secure a court decree at the High Court of Kenya at Nairobi, Milimani Commercial Courts in Nairobi High Court Miscellaneous Civil Application No. 237 of 2009, was a valid arbitration award issued by Eng. Joseph Theophil Thuo, a fact they knew to be false.
7. The Prosecution closed its case on the 18<sup>th</sup> day of July, 2019. Submissions on case to answer were done on 3<sup>rd</sup> day of October, 2019 and the Court delivered its ruling on whether the prosecution had established a prima facie case against the accused on 30<sup>th</sup> October, 2019.
8. The 2<sup>nd</sup> accused- Thomas Moturi Oyunge was acquitted of all the charges under section 210 of the Criminal Procedure Code after the court's finding that no prima facie case had been made against him by the Prosecution. Consequently, only the 1<sup>st</sup> accused -John Moguche Zachariah and the 3<sup>rd</sup> accused-Binlaw Construction Company Limited were placed on their defence.
9. A summary of the Prosecution case is that Binlaw Construction Company Limited (the 3<sup>rd</sup> accused) was contracted to undertake rehabilitation of Mount Elgon District Water Supply and Sanitation facilities through contract number EIRP/WSS/PW30 by the Office of the President through the El nino Project Emergency Management Unit. The contract was signed on the 5<sup>th</sup> of May, 2000. The contract was initially intended to take eighteen (18) months beginning on the 23<sup>rd</sup> June, 2000. The project was not completed within the specified time limit. The Project Manager, Engineer Elijah



- Ngugu Mwengi (PW 1) extended the completion date by ninety (90) days in accordance with the contract but still the Contractor could not complete the works within the extended period.
10. The failure to finish the project within the designated timeframe prompted the Project Manager to invoke the penalty clause and charged the contractor liquidated damages for the delayed completion and pegged damages at 165 days of delay, charging 0.05% on the contract price per day for the said number of days as provided in the contract.
  11. Binlaw Construction Company Limited through the 1<sup>st</sup> accused disputed liability for payment of liquidated damages and referred the dispute to the adjudicator per clause 25 of the contract. The Prosecution's narrative is that Binlaw's objection to payment of liquidated damages was dismissed by the sole arbitrator, D.J.O Fitzgerald who ordered Binlaw Construction Company to pay the liquidated damages to the employer.
  12. The 3<sup>rd</sup> accused (Binlaw Construction Company Limited) was dissatisfied with the adjudicator's determination. Through the 1<sup>st</sup> accused, it challenged the arbitrator's decision by seeking the arbitration, again as provided in the dispute resolution mechanism under the contract. The matter was heard by a single arbitrator, Engineer Joseph Theophil Thuo. He made his decision on 31<sup>st</sup> October, 2002 and communicated the same to the parties through his letter dated 6/11/2002.
  13. This genesis of this criminal case is the said arbitration award dated 31/10/2002 delivered by Engineer Joseph Theophil Thuo.
  14. The Prosecution's case is that the 1<sup>st</sup> accused altered the genuine arbitration award which was made on 31<sup>st</sup> October, 2002 with the intention of committing fraud and went ahead to file enforcement proceedings before the High Court using the doctored award and obtained a court decree which he attempted to enforce with a view to fraudulently compelling the Ministry of Special Programmes to part with of 294, 443,904/=.
  15. The accused denied these allegations which are particularized in the charges before the court. He insisted the documents he used to file for enforcement of the arbitration award were the true outcome of the arbitration process that he received from the arbitrator, Engineer Joseph Theophil Thuo.
  16. The Prosecution set out to prove these allegations against the accused by calling fourteen (14) witnesses who testified with supporting documentary exhibits. Apart from thirteen witnesses of fact, Prosecution also called a forensic document examiner who produced the forensic document examination report.
  17. Engineer Elijah Ngungu Mwengi (PW 1) was the first prosecution witness. He told this Court that he was the Project Manager with the El nino Emergency Project Unit that was based at the Office of the President. He worked in that office from 1<sup>st</sup> April, 1999 to 31<sup>st</sup> January, 2004 when he left on retirement.
  18. He recalled that the project subject matter of this case was being funded by the African Development Bank. The contract was intended to take 18 months but it was not completed on schedule. Due to this delay, he charged the contractor liquidated damages. He explained:

“...These damages are an assessment of what the client is losing by not having enjoyed the services. We penalized Binlaw for 165 days. This is after we had given 90 days' extension period...”
  19. The Contractor disputed and referred the matter to adjudication. It succeeded slightly by having the days used for computation of liquidated damages reduced from 165 to 140 days. The contractor was



still disgruntled. He thus referred the matter to arbitration. The arbitrator agreed with the adjudicator's findings and conveyed that decision by his letter dated 6/11/2002 to PW 1 and on behalf of the Contractor, Binlaw Construction Company Limited; to Engineer Moguche Zachariah (1<sup>st</sup> accused). This forwarding letter was later produced as P. Exhibit 1a and the arbitrator's final award dated 31/10/2002 produced as P. exhibit 1b. PW 1 said upon receiving the letter and the award, he marked them to the attention of the Project Engineer- Engineer Jackeline Musyoki (PW 3).

20. He testified that the final arbitration award (P. exhibit 1 b) that was forwarded by Engineer Joseph Theophil Thuo to his office through the letter of 6/11/2002 (P. exhibit 1 a) had framed the following issues:

- I) If the adjudicator was appointed in accordance with the contract?
- II) What dispute was referred to the adjudicator?
- III) Did the adjudicator act contrary to the provisions of clause 5.1 and do the work of the Project Manager?
- IV)
  - (i) Did the adjudicator consider the letters by the consultants extending the contract to 24<sup>th</sup> December, 2001?
  - ii) What was the agreed mode of communication between the parties?
- V) What is the effect of late decision on extension of time by Project Manager?
- VI) Did the adjudicator consider late possession of all sites?
- VII) Was the amendment of contract completion date within adjudicator's jurisdiction?

21. The witness (PW 1) further testified that when he was invited by the Kenya Anti-Corruption Commission, he was also shown an arbitration award (later produced as P. exhibit 2) where he noticed a number of variations when he compared it with the arbitration award received by him from the arbitrator through the letter dated on 6/11/2002.

Some of those differences included:

- i) The fonts between the two documents looked different.
- ii) On page 6 of P. exhibit 1 b, issue IV was split into two as follows: IV (i) & (ii) while in P. exhibit 2, there is no such splitting.
- iii) In P. exhibit 2, the issues were numbered up to IX which is not in P. exhibit 1 b which had issues numbered up to VII
- iv) The amount of Kshs. 97, 176, 206/= in P. exhibit 2 was not in the arbitration award sent to PW 1.
- v) He also pointed out that in P. exhibit 2, under the heading, summary of findings;

“...there has been added a statement which was not in PMFI-1b (P. exhibit 1b). Page 9 of PMFI-2, there has been an additional sentence in item no. 7 (i) which was not in the original award. At page 3 of MFI-2 there has been additional item 3 which starts with



the word finally...the claimant prays for Kshs. 97,176,206/= arising from compensating events. The figure of Kshs. 97,176,206 never arose anywhere during arbitration...”

22. The witness stated that he first saw P. Exhibit 2 at the Kenya Anti-Corruption Commission when was summoned there.
23. On cross-examination, the witness explained that as the Project Manager, he he had overall responsibility over the Project although he had delegated the supervision of the project to the Project Engineer who reported to him. He maintained that Binlaw did not finish the work on time and further that Kshs. 97,176, 202/= was not subject of the arbitration award before Engineer Joseph Theophil Thuo.
24. Redemptor Nyokabi Nga'ng'a (PW 2) testified that at the time relevant to this case she was working for the Institute of Certified Arbitrators (ICA). Engineer Joseph Theophil Thuo, was an arbitrator and Chief Executive Officer of the Institute. She had worked with him as her boss since 2001.
25. Her duties included typing of documents from the Institute. She also typed Engineer Joseph Theophil Thuo's arbitration awards.
26. She confirmed that she was the secretary who the typed the letter P. exhibit 1 (a) and the accompanying arbitration award P. exhibit 1 (b). She also testified that she appended her signature on arbitration award P. exhibit 1 (b) as a witness to Engineer Joseph Thuo. She asserted that she was conversant with Engineer Thuo's signature and confirmed it was the one appearing in P. exhibit 1 (b) signed on 31/10/2002.

However, on being shown P. exhibit 2, she stated:

“...I first saw this document when it was brought to our offices by KACC officials. I am not the one who typed the document. I am not the one who signed the document. The signature on the document is not that of Engineer Thuo...I did not type this document...”

27. On cross-examination by the late Advocate Nyakundi for the accused (may his soul rest in eternal peace), the witness was emphatic that when Engineer Joseph Theophil Thuo appended his signature on P. exhibit 1 (b), she was present and she consequently appended her own signature as his witness.
28. Josephine Kalondu Musyoki (PW 3) stated that she worked as a Project Engineer El nino Rehabilitation Project under the Office of the President. At the time of giving her testimony in court, on 25/9/2014, she was the serving as the Chief Executive Officer of the Water Services Trust Fund.
29. Engineer Elijah Ngungu Mwengi (PW 1) was head and Project Manager of El nino Emergency Project.
30. As a Project Engineer, she testified that she ensured that the affected districts submitted projects that were to be rehabilitated. It also involved getting contractors or consultants to rehabilitate those projects.
31. She stated that Binlaw Construction Company was awarded the contract for rehabilitation of Mt. Elgon Water and Sanitation Facilities, contract number EIRP/WSS/PW30 through an agreement dated 5/5/2000.
32. A dispute arose when the Project manager charged the contractor liquidated damages for the delay in completion of the project. Binlaw referred the dispute to the adjudicator-the late Mr. Fitzgerald who awarded 0.05% of the final contract price per day for 165 days to be charged on the contractor as



the penalty. The contractor who had referred the matter to adjudication was not contented with the adjudicator's decision. He filed for the arbitration. The arbitrator was Engineer Joseph Theophil Thuo.

33. She testified that she was conversant with the final arbitration award (P. exhibit 1 b) forwarded by Engineer Joseph Theophil Thuo via a letter dated 6/11/2002 (P. exhibit 1 a) and received at the El nino Emergency Project Office on 7/11/2002 whereby the registry stamp registration number 23753 was affixed and the letter marked to her attention by the Project Manager, Elijah Ngungu Mwengi (PW 1).
34. She said when she was summoned to EACC, she was shown the final arbitration award that had come to her attention at the El nino Emergency Project Unit office (per P. exhibit 1 a & b). However, she was also shown another arbitration award- P. exhibit 2 in which she noted a number of discrepancies from the one she had dealt with while at the office (P. exhibit 1 (b)). The discrepancies included: P. exhibit 1 (b) had been received and stamped and registry registration number for the El nino Project Unit number 23752 affixed, P. exhibit 2 did not bear El nino Registry stamp or registration number. The font was different in the two documents. At pg. 3, P. exhibit 1 b, article 3.2 ends with the sentence:

“the claimant prays that liquidated damages should not be charged and that the amount of Kshs. 3,268,735 deducted from his payments be returned to him...”; in P. exhibit 2, after this sentence, there is an additional sentence reading “finally the claimant prays for his payment of Kshs. 97, 176, 206 arising from compensating events” which is not in the original P. exhibit 1b.

· At pg. 5, paragraph 3 from the top in P. exhibit 2, there is a sentence that reads-“the respondent will process the claim of 97,176,208 and pay it accordingly. In the original P. exhibit 1b, that sentence is not there. At pg. 6 of P. exhibit 2, nine issues are framed while in P. exhibit 1 b, only seven issues are framed. In P. exhibit 2, pg. 6; article IV, the issue is framed thus- “did the adjudicator consider the letters by the consultants extending the contract to December, 2001; whereas in P. exhibit 1b, IV is broken into (i) & (ii), which is not the case with P. exhibit 2. What is IV in P. exhibit 1 b is V in P. exhibit 2. This discrepancy is apparent on VI of P. exhibit 2 and VI of P. exhibit 1b, and also VII of P. exhibit 2 and VII of P. exhibit 1b. Moreover, P. exhibit 2 had VIII and IX which were not in P. exhibit 1 b. The issue framed in issue IX in P. exhibit 2, “what was the decision of the adjudicator on the claimant’s prayer on payment of Kshs. 97,176,206/= arising from compensating events, was not in P. exhibit 1b. Further at section H of P. exhibit 2; the adjudicator defined the dispute referred to him as follows- “... and if so, by how many calendar days and also decide if Kshs. 97,176,206/= arising from compensating events is payable to the respondent. That she said differed with what was in P. exhibit 1 b, the words “and also decide if Kshs. 97, 176, 206 arising from compensating events is payable by the respondent” are not in P. exhibit 1b. On page 9 of P. exhibit 2, at section 7 with the heading; ‘Amendment of the date of completion’ I declare.... for 165 (one hundred sixty-five) calendar days and the respondent shall pay Kshs. 97,176,206/= arising from compensating events which money shall be subject to clause 43.1 and 43.2 in respect of interest, the later part of the statement relating to the respondent paying the claimant was not in P. exhibit 1b. Moreover, on the same page section VII paragraph 3 of P. exhibit 2; after the words, “I find for the respondent” the words “I find for the claimant on prayer for payment of Kshs. 97, 176, 206/= due to compensating events as per adjudicators final decision, this statement was not in P. exhibit 1b. At number 5 in P. exhibit 2, the part with the heading, “summary of finding on issues” it reads “I find for the respondent except for claim for payment of Kshs. 97,176,206/=due to compensating events which I find for the claimant”, the later part of the sentence did not appear in P. exhibit 1b. Also, further down at 7.1 of P. exhibit 2, read, “the claimant’s claim fails except on prayers for payment of Kshs. 97, 176, 206 due to compensating events which succeeds and the tribunal upholds the adjudicator’s decision”, she testified that this differed materially from that in P. exhibit 1b which reads, “claimants claim fail and the tribunal upholds the adjudicator’s decision”.



35. She testified that during the process of arbitration, she was part of the team that compiled the evidence so as to counter the claimant's allegations. She together with Engineer David Olwenyo (PW 5) personally appeared before the arbitrator when the issues were discussed and directions given by the arbitrator. She said that the arbitrator's decision was then communicated to their office. The claimant's/contractor's claim was dismissed per P. exhibit 1 b, and adjudicator's decision was maintained. That was not the position in P. exhibit 2 where the claimant's claim to the tune of Kshs. 97,176,200/ is indicated as having succeeded against the employer, an issue that was not covered in P. exhibit 1b.
36. Nevertheless, she conceded that the Contractor had raised the issue with the El nino Project Management Unit where the matter of compensating events was dealt with and the amount found payable to the Contractor was found to be approximately 1 million shillings. She was resolute that the issue of payment of the sum of Kshs. 97,176, 206/= was neither canvassed before the arbitrator nor did it appear in the arbitrator's final award.
37. She stated that besides the delay, the Project Management Unit had also factored some works that the contractor had not completed and costed it, this came to around Kshs. 1,600,000/=. They approached the Bank to recover the same from the Bank Guarantee but the Bank refused to cooperate. They approached the Attorney General's Office to recover the amount but as at the time of completing the project, the El nino Project Management Unit had not succeeded in realizing the said monies.
38. On cross-examination, she was put to task on whether the project designs were adequate to commence the works, she replied:

“...the designs were adequate to commence the works, there were no adjustments to be made. I do not recall if the contractor needed adjustments to the water treatment plants. I would not remember how many days were between the date when the contractor took over the site...”

On the issue of compensating events, she said:

“...I recall the contractor was required to change the water intake, I can't recall if this was actually done. The variations that took place were not reflected in the original bill of quantities. These are what are referred as compensating events. I cannot give the actual number of compensating events, but they were several. As to whether they were employer faults, they would have to be analyzed...in the absence of the list, I could not be able to state so conclusively, I do not have the list...”

39. Mr. Nyakundi further referred the witness to clause 57 of the contract marked as DMF1-2 but not produced. The witness was led to read into the record the contents of the said clause. She went on to state that the Contractor had in fact submitted a final claim of Kshs. 97, 176, 206 in accordance with clause 57 of the contract on a document that appeared to have been via a letter dated 27/11/2002 but the letter seemed to have been received and stamped at their offices on a date indicating 15<sup>th</sup> May without mentioning the year. She however affirmed:

“...when it was received contractor's claim was not admitted. The claim was not approved by the Project Manager. It was disputed that time. This claim was submitted that time and Project Manager did not approve because it did not have merits. One of the reason was that the contractor did not complete the work on time, the contract was for Kshs. 32,000,000/ =...”



Asked if this amount was part of the adjudication, she replied:

“...We went for adjudication. It was not on this particular dispute if I may clarify, we had other matters that we referred for adjudication...”

40. When it was put to her that she used the Anti-Corruption Commission to criminalize a civil dispute, she refuted that and explained:

“...It is not us who did that. It was Treasury. I think it was ok. We had done our part and the Contractor wrote to Treasury to demand payment...”

41. On re-examination, she was categorical that as the Project Engineer, there was no basis for the claim for Kshs. 97,176, 206/=. She lay emphasis on this point as follows:

“...If that amount was paid or is paid today, if I am told 97,176,206/- was/is paid, I would be shocked. The contract was 32,000,000/- so to hear somebody has paid I would be shocked...”

42. Engineer David Ogega Orwenyo (PW 5), testified that he was part of the Government defence team that was put together to prepare the Government’s position to counter the Contractor’s claim when it was referred to arbitration after the contractor was dissatisfied with the adjudicator’s decision. The adjudicator had found in favour of the Government by requiring Binlaw to pay liquidated damages at 0.05% of the final contract price per day for 165 days. The other team members in the Government defence team were Engineer Josephine Musyoki (PW 3) and Engineer Peter Mangiti who was not called as a witness.

43. On 13/8/2002, both sides, the Government side and Binlaw Construction representatives being Engineer Moguche and a Mr. Wafula, a quantity surveyor met. They agreed on issues and procedure that was to be followed. The arbitrator then issued directions. They held one more meeting on 6/9/2002 to confirm their responses and left the matter to the arbitrator to make a decision. The decision was delivered on 31/10/2002 as per P. exhibit 1 (b).

44. When he was summoned to EACC in 2010, he was shown some documents indicating that Binlaw had presented a claim of Kshs. 97,000,000/- before the arbitrator. He stated:

“...I actually denied that the amount was subject of arbitration I participated in...In preparing the defence, we did not discuss any quantum that may have resulted in compensating events. The only issue was liquidated damages charged...”

45. He explained that compensating event are additional costs that may be incurred by a Contractor when carrying out works that are not a result of his own acts of omission or commission, but are as a result from the employer not giving his part of contract due attention or due to delay causing the contractor to meet costs. He said that issue was not a factor during arbitration process, he quipped:

“...For this particular arbitration I participated in, there was no issue of compensating event...”

46. Samuel Njaramba Wagitu (PW 4) informed the Court that he was the Secretary, Pending Bills Committee from the year 2005. His duties as the Secretary of Pending Bills Committee was to advise the Principal Secretary of the National Treasury on matters concerning pending bills that were being submitted by Contractors, Suppliers and Consultants to the Committee for analysis.



47. He stated that he got involved in this matter after a letter reference number OP/SP/R & R/5/3/30/11 dated 8/12/2009 (P. exhibit 3) was marked for his attention on 10/12/2009 by the then Principal Secretary of National Treasury, Mr. Kinyua. He testified that Mr. Kinyua wrote a note (P. exhibit 4) while forwarding to him the letter (P. exhibit 3). He asked him to confirm if what had been stated in the letter from P.S. Ministry of Special Programmes (P. exhibit 3) was the actual position that had been reached by the Pending Bills Committee after analysis of Binlaw's claim. He explained:

“...I noted that the P.S Ministry of State for Special Programmes was explaining why his Ministry had delayed in paying a debt arising from a decree issued by the Court following a suit filed by Binlaw Construction. From the letter, the P.S was informing Treasury that the bill had been analyzed by Pending Bills Committee and found not to be payable, when the Company was found to owe G.O.K Kshs. 1,183, 178.60. The P.S went on to explain that in April, 2009; he had been required to appear in Court and explain why the Ministry had not paid Messrs. Binlaw Construction LTD, a sum of Kshs. 238, 106, 680/-. The P.S advised Treasury the amount had since increased to Kshs. 289,909, 214 as a result of interest accruing. The author was asking for money to pay this sum...”

48. The witness stated that after appraising himself on the issue, he perused the Pending Bills Closing Committee records to ascertain how the issue had been dealt with. He explained:

“...Having noted from MFI-3 (read P. exhibit 3) that the Minister for Special Programmes had stated that the bill had been examined by Pending Bills Committee and his reference that the Company Binlaw went to Court in April, 2009 and that Deputy Solicitor General referred to the case as having been referred for adjudication and Company having been awarded 97,176,206/- I found some discrepancy. This is because, when I looked at our records and bill submitted by Binlaw and the award by the adjudicator, I found that the adjudicator had not made such an award. Further, Binlaw being dissatisfied with adjudication had the matter referred to arbitrator who upheld adjudicator's award. Once again there was no award of Kshs. 97,176,206/=. I also noted the date cited in MFI-4 (now P. exhibit 4) corresponded to the date from our records in which the arbitrators award was awarded but the amounts differed. My suspicion was aroused and I advised the P.S that there were discrepancies in the letters MFI-3 and MFI -4 and our records and advised him to refer the matter to EACC to investigate whether the award referred to MFI-4 was authentic...”

49. He testified that the P.S Treasury acted on that advise and wrote to Acting Director EACC, Mr. Mutonyi the letter dated 27/1/2010- P. exhibit 5. The same was responded to by EACC on 2/3/2010- P. exhibit 6.

50. On receiving the response from EACC, the P.S Treasury instructed him to draft, for the P. S's Treasury signature, a letter to P.S. Ministry of Special Programmes advising him not to make any payments. The letter was also copied to the Attorney General advising him to move to court and set aside the decree. (see letter ref. ZZ/250/03/F dated 12/3/2010- P. exhibit 13).

51. He also referred to the letter dated 5/4/2007 ref. Conf. 51/03/A- P. exhibit 7 in which the P.S. Treasury wrote to Messrs. Binlaw Construction Company conveying the decision of Pending Bills Committee



on the claim that it had submitted for analysis. The committee had evaluated the claim and found the amount due to the employer/ Government from Binlaw was Kshs. 1,183,178.60. He went on:

“...The Kshs. 97,176,206/= were costs due to extension of time claimed by Binlaw which we found not to be payable. We did our analysis in April, 2007...”

52. On cross-examination, he said it was Binlaw which submitted its claim to the committee. He testified that it is after this that the Committee called for relevant documentation from Binlaw Construction Company as well as the Government Department that Binlaw had dealt with.

53. Challenged by the Advocate for the accused that the Committee was a stranger to the contract yet it had vested itself with a mandate it did not possess; he explained that their mandate was given by His Excellency the President through the Kenya Gazette notice number 297 of 14/1/2005 (P. exhibit 18). He stated:

“...The Committee was established by H.E. the President through the gazette notice and was to work on all pending bills owed by the Government and those who believed they were owed were to submit their claims for analysis and Committee was to analyze and advise the Government. If anybody felt the Committee did not have the mandate, they needed not submit but if you submitted, it means you agreed with that mandate...”

54. Put to him that the Committee was appointed about five years later after the contract had been entered into on 5/5/2000; the witness said that was true but there were pending bills that existed regarding the same contract.

Asked to expound on what analysis entailed by the Court, he said:

“...Analyzing the bills entailed looking at all the information regarding the contract e.g. scope of work, record regarding the work the Company did, the value of work, amount paid to the Company or not paid, and the Committee would determine the issues on the basis of contract agreement signed with the Government. The Committee would also assess the documents of the client on why he thinks he is owed money then make a decision...”

55. During re-examination by Ms. Emily Kamau for the Prosecution, the witness was referred to the relevant gazette notice that established the Pending Bills Closing Committee (P. exhibit 18) in which pointed out that at number (c) the Committee’s Mandate was to “identify cases where there may have been fraudulent or corrupt claims against the Government”.

56. Vincent Kibet Kiptoo (PW 10) was a member of the Pending Bills Closing Committee which was established under Kenya Gazette Notice Number 297 of 2005 on 14/1/2005. He was then working as an Investigator with Kenya Anti-Corruption Authority when he was appointed and deployed to serve in the Pending Bills Closing Committee. The term of reference was to “receive all claims against the Government of Kenya, analyze and make recommendations either for payment, recovery or further investigations.”

57. When work commenced, any person or entity that had a claim against the Government was invited to submit. They received several claims in which over 100 billion shillings was being demanded. Binlaw Construction Company Limited submitted its claim in April, 2005. It was claiming Kshs. 162,932,105.70 which had been broken down as follows:

- i) Cost due to extension of time was Kshs. 97,176,206
- ii) Accrued interest Kshs. 65,755,899.70



58. After the analysis of documents from the contracting Ministry, that Ministry of Special Programmes and those from the claimant, i.e Binlaw Construction Company Limited; the Pending Bills Closing Committee compiled its Report number. 76 –P. exhibit 20 in respect of Binlaw Construction Company Limited. The report noted that the contract was for a sum of Kshs. 32,687,350/= and it was set to commence on 23/6/2000. The client was Project Management Unit El nino Emergency Programme under the Office of the President. The claimant, Binlaw Construction had provided its supporting documents.
59. They noted that the Contractor and the client had differed on some aspects of the contract and this had been settled through adjudication and subsequent arbitration.
60. At the end of the analysis, they concluded that Binlaw was entitled to Kshs. 1,696,821.40 whereas the employer was entitled to claim from Binlaw Kshs. 2,880,000, consequently, it was Binlaw that owed the client Kshs. 1,183,178.60. They thus advised the appointing authority that the claim by Binlaw for Kshs. 162,932,105.70 was not valid and the Government was entitled to recover Kshs. 1,183,178.60 from Binlaw. This resulted in the P.S Treasury’s letter ref.CONF./51/03/A dated 5/4/2007- P. exhibit 7 communicating those findings to Binlaw Construction Company Limited.
61. By a letter dated ref. CONF.51/03/A of 6/12/2006- P. exhibit 21; the P.S Treasury wrote to KACA Director concerning implementation of the Pending Bills Committee Recommendations in which the Committee had identified 24 cases to be pursued for investigations/recovery. Number 4 on that list was Binlaw Construction Co. Limited in which the project was Emergency Rehabilitation of Mt. Elgon Water Supply and Sanitation Facilities. When this letter was received at KACC, it was marked to him with a forwarding note as follows:
- “Kiptoo- Collect original documents as you will head the investigation team.”
62. He contacted the Pending Bills Closing Committee to be provided with all the documents in respect of 24 claims listed in the letter of 6/12/2006- P. exhibit 21. For Binlaw Construction Company Limited, the focus that time was recovery of Kshs. 1,183,000 which the Committee had concluded the Contractor owed the Government.
63. In the year 2010, the P.S Treasury wrote to the Commission notifying that Binlaw Construction Company was now the one demanding payment which was in fact against the Pending Bills Closing Committee recommendations. He joined the Investigating Officer and went to Court to confirm the details of the award that had been filed to obtain the decree in question. When it was compared with what had been availed to the Committee for analysis, it was found to be discrepant. The alleged amount of Kshs. 97,176,206 was not an issue during arbitration proceedings. It was advised that the Attorney General moves to Court to set aside the decree.
64. He and the Investigator visited the arbitrator- Mr. Theophilus Thuo at his Office and showed him the award- P. exhibit 2 that had been retrieved from the court file-P. exhibit 17. The arbitrator checked it then pulled out the copy of the award he had kept in his office. The award that had been received by El nino Project Management Unit and forwarded to the Pending Bills Closing Committee when the Contractor raised his claim for analysis was similar to the one to the arbitrator retrieved from his own records at his office but those two documents were quite different from the one that had been recovered from the court file (P. exhibit 2) hence the need for more comprehensive investigations which he left to the investigating officer to conduct.



65. In the year 2010, Senior Deputy Solicitor General, Muthoni Kimani, PW 7 was working in the Attorney General's Office as the Head of Civil Litigation Department where she was overseeing all civil litigations against the Government.
66. On the 26/8/2009; she testified that a Litigation Counsel who worked under her, one S.N. Gikera did a brief to her on Binlaw Construction Company Limited versus Office of the President, Ministry of State for Special Programmes. She identified the said brief in Court, ref. AG/CIV/739/09-P. exhibit 14, According to the brief prepared by S.N. Gikera; Binlaw had been awarded a contract to rehabilitate Mt. Elgon District Water Supply following the El nino rains but the same had been extended from the initial date of 31/10/2001 to 24/12/2001 hence Binlaw claimed Kshs. 97,176,206/= as per conditions of contract. In the said brief, Mr. Gikera indicated that there had been adjudication on 24/5/2002 where the adjudicator upheld Binlaw's claim that Binlaw should be compensated for prolongation costs and extra works as per conditions of contract-clause 43.1 and 43.2. He further added that after adjudication, the matter went before single arbitrator J.T. Thuo who delivered final award on 31/10/2002 where the arbitrator dismissed the claim by the contractor but upheld the award of Kshs. 97,176,206.00. Additionally, it was also contained in the said brief that on 17/04/2009; Binlaw moved to Court for registration and enforcement of the award after failing to get payment. The late Justice Khaminwa heard the application and issued the decree on 26/5/2009 for payment of the amount with interest. The decree was directed at the Office of the President through the Ministry of State for Special Programmes through the El-nino Project Management Unit.
67. Earlier on 28/05/2009, the Ministry of State for Special Programmes had written to the Attorney General explaining that it became a Ministry on 1<sup>st</sup> July, 2006 and as such at the time of the El nino Project, the Ministry did not exist and the projects in question were undertaken by Provincial Administration & Internal Security (this letter ref. OP/SP/1/61 dated 28/5/2009 was produced as P. exhibit 8). The Ministry thus contended that it could not settle the decree because it was neither a Party nor did it sign the contract. Further that it was not represented in the arbitration proceedings. In the said letter, attached was the letter dated 4/6/2009 by Victor Githinji Advocate reference VG/CCR/240/09- P. exhibit 14 (a) and the decree of the High Court issued on 26/5/2009 in Misc. Suit No. 237/2009- P. exhibit 14 (b). Litigation Counsel S.N. Gikera in his brief noted an award of Kshs. 97,176,206/= had been made to Binlaw Construction as per the arbitration award of 31/10/2002. He opined that contract was entered into by Government hence the Ministry should settle the decree.
68. The witness further identified and produced in evidence letter reference number VG/BCL/240/09 dated 5/1/2010- P. exhibit 9 from Victor Githinji Advocate addressed to the Permanent Secretary Ministry of State for Special Programmes and copied to the Attorney General and this particular witness. In the said letter, the Advocate was complaining that the Ministry of Special Programmes had not settled the decree which continued to attract interest that was accruing at the monthly rate of Kshs. 2,267,447/= and the amount had since accumulated to Kshs. 292,176, 459/= as at 31/12/2009. He was notifying that he would be seeking an order of mandamus.
69. On 21/1/2010, through a letter ref. number AG/CIV/739/09- P. exhibit 10; the witness wrote to the P.S. Ministry of State for Special Programmes advising the Ministry to settle the decretal amount in order to avoid unnecessary litigation.
70. On 12/3/2010, the Attorney General's Office received a letter ref. ZZ/250/03/F- P. exhibit 13 dated 12/3/2010 from the Office of Deputy Prime Minister, the National Treasury addressed to Moses Gitari, Office of President Ministry of State for Special Programmes bearing the subject matter- Arbitration between Binlaw Construction Co. & Office of President Ministry of State for Special programme signed by Joseph Kinyua, and copied to Attorney General Amos Wako and Ambassador



Francis Muthaura, the then Head of Public Service. The letter indicated that the Pending Bills Closing Committee had evaluated Binlaw claim and established that they were not payable and that it was the Government which was to recover Kshs. 1,183,178.60 from Binlaw Construction Company instead. That a demand to that effect had been made to the Company by the National Treasury through a letter ref. CON. 51/03/A dated 5/4/2007-P. exhibit 7 and that payment had not been made yet. Treasury thus instructed the AG's Office to move to Court to set aside the decree and recover the said Kshs. 1,183,178.60.

71. On 16/3/2010, through a letter dated 16/3/2010 ref. number AG/CIV/739/09-P. exhibit 11 she wrote a letter to the P.S Office of Deputy Prime Minister & Ministry of Finance copied among others to Head of Public Service, Acting P.S. Ministry of Special Programmes and Acting Director KACC in response to the above letter of 12/3/2010. She clarified initially, it is the Ministry of Special Programmes which wrote to the Attorney General Office via the letter of 28/5/2009 seeking guidance after being served with a decree for enforcement of the award. The Ministry was denying liability since when the contract was entered, it was not in existence. No other reason was given, and it was the AG's position that this was not a justifiable reason to appeal against the award. She further clarified that had the documents before the Pending Bills Committee been availed to the AGs Office earlier, it would have discovered the documents relied on by the claimant were not genuine. She also indicated that they would be making the necessary application to have the decree nullified.

Nevertheless, the witness stated:

“...We wrote to the Ministry to be able to provide us with documents to proceed to Court and have the decree nullified. They did not, they said the matter was under KACC...”

72. On cross-examination, she was asked if the Attorney General had moved to Court as intimated to have the decree nullified, she explained:

“...I have not. The investigations were still going on and documents were with the investigators. There are criminal proceedings going on in this court...”

73. Moses C. Gitari (PW 11) was the Acting Permanent Secretary in the Ministry of Special Programmes from February 2010 to October, 2010. In his evidence he confirmed addressing various issues relating to this case and even personally authoring some of the correspondences alluded to by other witnesses in the case already. He in personally authored the letter ref. OP/SP/1/61 dated 28<sup>th</sup> May, 2009 which was addressed to the Attorney General and which he produced as P. exhibit 8. Further, the letter of 2/1/2010 ref. OP/SP/R & R/5/3/30/16 which he produced as P. exhibit 24. At the time, he said he was consulting the Treasury for an amicable solution.

74. Antony Mbiyu Kamuyu (PW 9) was the Court Executive Officer in charge of Milimani Commercial, High Court Division in the year 2009. His duties were supervision of judicial staff in that division, attending to litigants' complaints, registration of suits and having the custody of court files among other duties. In his evidence, he gave a step by step description of case registration process until the file is allocated a date.

75. Testifying about Milimani Commercial Courts, High Court Miscellaneous Application Number 237 of 2009- P. exhibit 17; he said he was aware of the matter. He became conversant with the file when KACC investigators went seeking to be given the file for purposes of investigations. The file contained documents filed by Advocate Victor Githinji among them Chamber Summons dated 17/4/2009 seeking orders for the enforcement of an arbitration award. It was supported by an affidavit sworn by John M. Zachariah on 17/4/2009. He deposed at paragraph 17 that the amount outstanding as



- at 30/3/2009 was Kshs. 271, 769, 456.00. There were annexures to the supporting affidavit namely: a copy of the letter dated 11/3/2009 from Eng. J.M. Zachariah of Binlaw Construction Company Limited to Permanent Secretary Ministry of Special Programmes, letter by Advocate Victor Githinji on behalf of Binlaw Construction Company to the Registrar High Court of Kenya, Milimani Commercial Courts dated 6/4/2009 enclosing final award of arbitration by Engineer J.T. Thuo for 31/10/2002 and Adjudicator's award given by Engineer Desmond Otho Fitzgerald on 24<sup>th</sup> May, 2003 as well as a certified copy of the contract agreement entered into by the Parties on 5<sup>th</sup> May, 2000.
76. The executive officer testified that the matter was placed before the Deputy Registrar, the late Hon. Shadrack Okato on 17/4/2009 when the Advocate, Victor Githinji took a date for the hearing of the Chamber Summons.
77. On 21/5/2009, the matter was placed before the late Lady Justice Khaminwa and orders were granted *exparte*. That order was extracted and signed by the Deputy Registrar, the late Hon. Shadrack Okato on 26<sup>th</sup> May, 2009.
78. There was no other appearance in this matter apart from the request for the decree.
79. The Attorney General through a letter dated 16/6/2009 wrote to the Deputy Registrar seeking authority for one J. Mutoro to peruse the court file and to photocopy the proceedings. EACC equally wrote to the Deputy Registrar on 15/2/2010 to equally peruse and photocopy the pleadings and the proceedings.
80. All what was needed was supplied. By a letter dated 23/2/2010, received by the Court on 24/2/2010; KACC sought to obtain certified proceedings and documents used in filing the Misc. Number 237 of 2009. The same was supplied on 25/2/2010.
81. The Document Examiner, P.W. 12-Mr. Antipas Nyanjwa gave evidence of his qualifications in the field of document examination before the Court. He testified that he holds a master's degree in criminology and forensic science besides attending other external studies in document examination in various countries among them France, Israel, Australia, Norway, Switzerland, United Kingdom among many others. He had been a practicing document examiner in Court for over 20 years and has testified both locally and outside the Country including in the United Nations.
82. He testified that on 29/10/2020, he received the exhibit memo ref. KACC/AT/Inquiry/4/2010 dated 26/2/2010 (P. exhibit 25) from Gerald Munyiri (PW 14) of KACC. The disputed documents forwarded through the exhibit memo were as follows:
- 1) A1 which was the document titled "Final Award of Arbitration dated 31/10/2002" which in these proceedings is P. exhibit 2
  - 2) A2 which was the supporting affidavit sworn by John Moguche Zachariah dated 17/4/2009
  - 3) A3- another supporting affidavit by John Moguche Zachariah dated 12/2/2010
  - 4) A4- letter of Binlaw Construction Co. Ltd dated 22/9/2009
83. He also provided specimen signatures B1-B7 (P. exhibit 26) for Engineer Joseph Thuo, B8-B14 (P. exhibit 27) for Redempta Ng'ang'a (PW 3), B15-B20 (P. exhibit 28) specimen signatures for John Moguche.
84. Also forwarded were known and undisputed signatures on the document marked C1 & C2 which is P. exhibit 1 (a) & I (b) in these proceedings.



85. He was requested to find out whether the signatures on the disputed documents, that is, P. exhibit 2 as well as the two supporting affidavits provided and in the letter by Binlaw Construction of 22/9/2009 could have been made by the authors whose specimen signatures had been submitted for comparison with the disputed documents.
86. He did the examination on 2/11/2010 and came up with the following findings.
87. When the specimen signatures and the known signatures of Engineer Joseph Thuo (see B1-B7; P. exhibit 26 & C1 & C2-P. exhibit 1 (a) & 1 b) were compared with the signature in the disputed document titled “final award in arbitration dated 31/10/2002” that was marked A1 (produced as P. exhibit 2) he found that the genuine and the known signatures of Joseph Thuo did not agree with the ones in the disputed document A1 (i.e. P. exhibit 2) hence his opinion was that Mr. Joseph Thuo’s signature on the document marked “final award of arbitration dated 31/10/2002” (which is P. exhibit 2 in these proceedings) was a forgery.
88. A similar comparison was done in respect of specimen and the known signature of PW 3, Redempta Ngán’gá (B8-B14-P. exhibit 27 & C1 & C2 -P. exhibit 1 a & 1b) and he equally confirmed that the specimen signatures and the known signatures of PW 3, Redempta Ngán’gá did not tally with the signature in A1 or P. exhibit 2. He thus concluded that the signature in P. exhibit 2 purporting to be that of Redempta Ng’ang’a was a forgery too.
89. The disputed signatures in the supporting affidavits of John Moguche A2 & A3 as well as the letter marked A4 were compared with his specimen signatures B15- B20 (P. exhibit 28) and they were found to be similar and indistinguishable hence signed by the same author.
90. He further compared the disputed document A1 (P. exhibit 2) with a similar known document marked final award (P. exhibit 1b) and he found no agreement between the two documents. P. exhibit 2 was in different format and had different fonts and prints.
- He produced the Document Examination Report as P. exhibit 29.
91. Evans Wachira Mbugua (PW 13) an Advocate of the High Court of Kenya admitted in the year 1998 commissioned the affidavits used in support of the High Court Misc. Application Number 237 of 2009, namely the one dated 17/4/2009 and the one of 12/2/2010. He said Mr. Githinji had an office next door and it was a custom built on trust between them that whenever he wrote a note and passed to him to commission an affidavit, he would just do it but if Advocate Githinji was not available to do the note, he had to personally see the deponent. In this case, Githinji had done the notes so he never personally witnessed the deponent signing, he signed on strength of the personal request by Advocate Victor Githinji.
92. Gerald Mwangi Munyiri (PW 14) was an investigator with Ethics & Anti-Corruption Commission from 2006 to the year 2012 when he left the organization for greener pastures. During his tenure at EACC he was assigned this case to investigate.
93. The complaint assigned to him to investigate was lodged by the Permanent Secretary of the Treasury, Mr. Joseph Kinyua through a letter ref. ZZ250/03 (E) dated 27/1/2010 (P. exhibit 5) which was addressed to Acting Director of KACC then, Mr. J.P. Mutonyi. In that letter, Mr. Kinyua also enclosed another letter from the Ministry of Special Programmes OP/SP/ R&R/5/3/30/11 dated 8/12/2009-P. exhibit 3. The gist of Mr. Kinyua’s letter, he explained was that Binlaw which had been awarded a contract to rehabilitate Mt. Elgon Water Supply on 5/5/2000 had on 30/5/2005 lodged a claim with Pending Bills Closing Committee for Kshs. 162,932,105.70 which was evaluated and found not to be valid and instead, it was the Company that was found to owe Kshs. 1,183,178.60 of which that



report had been forwarded to EACC for further action. He also explained that the dispute had before that been subjected to adjudication and arbitration process where the verdict was in favour of the Government. Mr. Kinyua's concern was how therefore the P.S. Ministry of Special Programmes was making reference to payment of Kshs. 97,196,206 awarded in the arbitration process as cost of delay plus interest making the sum of Kshs. 162,932,105.90/- yet the only dispute referred to the adjudicator and eventually the arbitrator as per the documents submitted to the Pending Bills Closing Committee related only to assessed liquidated damages that were due to the Employer and not the Contractor.

94. Since it was indicated Binlaw had moved to the High Court for the enforcement of the decree arising from the award of the arbitration, he wrote to the Registrar of the High Court through a letter ref. INV.6/1/VOL. IV/ (4) and on 24/2/2000 and obtained all the documents used in filing of High Court Misc. App No 237 of 2009- P. exhibit 17.
95. Once the documents were availed, together with fellow investigators Julius Muraya and Vincent Kiptoo (PW 10); they visited the Offices of Engineer Joseph Theophilus Thuo which was located along Ng'ong Road in February, 2010. He was in good state of health.
96. After explaining the purpose of their visit, they showed him the documents retrieved from High Misc. Application Number 237 of 2009 which included the arbitration award -P. exhibit 2 on which the application was founded. Engineer Joseph Theophil Thuo studied it and denied the signature in the arbitral award was his. His Secretary, Redempta Ng'ang'a (PW 2) who had been shown as having witnessed Mr. Thuos' signature too denied the signature the in arbitral award (P. exhibit 2) that was used to file the application for enforcement before the High Court.
97. Mr. Joseph Thuo availed a genuine copy he had kept from his own records. The investigating officer produced it as P. exhibit I (c). Compared to the one that had been retrieved from the Court records, the two documents were different in many respects, the font type, number of issues and actual determination.
98. He also obtained the documents that had been forwarded to the Pending Bills Closing Committee from El nino Emergency Project Rehabilitation Unit – P. exhibit 1 (a) & 1 (b) that the committee had used to analyze the claim lodged by Binlaw. The contents of P. exhibit 1 (b) were similar to those in P. exhibit 1 (c) which was the copy that Engineer Theophilus Thuo provided to the Investigators when they visited his Office. However, these two documents (P. exhibits I b & 1 c) were markedly different with P. exhibit 2 was used to file for enforcement of the decree.
99. He then interviewed and recorded witness statements of various witnesses who testified before this Court. He further submitted the disputed documents together with the specimen signatures to the document examiner for analysis via exhibit memo of 26/2/2010 on 29/10/2010. The document examiner testified and produced the report- P. exhibit 29 in court.
100. He also conducted a search at the Company Registry and obtained the report ref. CR13-C.40830 dated 11/8/2010- P. exhibit 33 which showed the Directors of Binlaw Construction Company as:
  - i) Charles Rioba Onguti- 20 shares
  - ii) Henry Rioba Onguti- 15 shares
  - iii) John Zachariah 450 sharesNon-Director Shareholders being:
  - iv) Donald Osidi Onguti- 100 shares
  - v) Seth Mong'are Onguti- 50 shares.



101. He completed his investigations and recommended the charges to be framed against the accused. The Attorney General concurred with the recommendations per letter ref. AG/CR/505/6/1124 dated 5<sup>th</sup> May, 2011- P. exhibit 34. He produced several other documents collected in the course of investigations as exhibits before the Court.
102. On cross-examination, the investigating officer emphasized that the focus of his investigation was forgery relating to filing of false documents in court and not the obligations of the parties under the contract. He stated:

“...What I investigated was forgery relating to filing of court documents, I was not investigating contractual obligations between parties. I investigated allegations of forgery to defraud the Government of Kenya by accused persons...”
103. He further stated that contractual related disputes were handled exhaustively through the adjudication and arbitration process and also by the Pending Bills Closing Committee. He insisted that compensating events was not an issue before Engineer Joseph Theophil Thuo.
104. Asked why he preferred charges against the 1<sup>st</sup> accused on behalf of Binlaw Construction as a Director yet there were other Directors as per Company Registry search, he responded:

“...He was the managing Director and he had signed all the documents that had been signed...”
105. The first accused, John Moguche Zachariah (DW 1) elected to give sworn evidence in his defence. He gave his testimony on 24<sup>th</sup> June, 2020 which was also continued and completed the following day on 25<sup>th</sup> June, 2020.
106. He stated that he is a Consulting Civil Engineer and the Managing Director of the 3<sup>rd</sup> accused, Binlaw Construction Company Limited.
107. He gave a chronology of how he came to get involved in the project which is the subject matter of this case.
108. He stated that the Government of Kenya in conjunction with the donors had come up with a project to rehabilitate infrastructure that had lost functionality due to damage caused by El nino rains. The project was overseen by the El nino Emergency Project Unit which was under the Office of the President.
109. In March 2000, the tender to rehabilitate Mt. Elgon District Water Supply and Sanitation Facilities was advertised in the local press. Binlaw Construction Company Limited applied for the tender as was other 13 firms.
110. Binlaw was notified that it was successful through a notification letter dated 20/3/2000 from El nino Emergency Unit Project Manager, Engineer E.N. Mwengi (PW 1).
111. On 5<sup>th</sup> May, 2000, the parties executed the contract for “Rehabilitation of Mount Elgon District Water Supply & Sanitation Facilities”.
112. On 15<sup>th</sup> June 2000, a meeting was held inside Mt. Elgon Forest ostensibly to hand over the contract sites to Binlaw Construction Company Limited. That meeting was chaired by Engineer Josephine Musyoki (PW 3) and was also attended by Engineer David Olwenyo (PW 5), the D.O. Mt. Elgon District, some civic leaders on one end and on the other end, there were officials from Binlaw Construction Company Limited.



113. Binlaw expected to be handed over 15 sites that day but only two sites were given. The site given was one where they were to construct a small dam and one in which there were to construct a water treatment plant to link with the dam. The other sites, (more than ten) which they were also supposed to work on were not given out. They came to be handed over after a very long delay of over one and half years (1 ½).
114. Moreover, they discovered that the project designs that were given to them to execute the works were also faulty. When they surveyed the area on 16/6/2000; the Contractor discovered that although he was asked to construct a small dam to flow water to the treatment plant by gravity, the water treatment plant was elevated by 3 metres from the site he had been shown to construct the small dam. He asked for official designs he could implement but none was forthcoming. He went ahead and designed the correct profile and forwarded for approval so that he could begin the work. This approval was also delayed by at least five weeks until September, 2000 yet work ought to have commenced on 23/6/2000.
115. These incidents made the Contractor lose a lot of time which according to the contract he was entitled to be compensated for the delays which occurred without fault of his own. He explained:
- “...It was clearly stated that when something happened that prevented the Contractor from proceeding with the works, he has to be compensated. For instance, they gave wrong design so the Contractor could not start the work when it was due...”
116. His testimony was that the work should have commenced on 23<sup>rd</sup> June, 2000 and finished on 22<sup>nd</sup> February, 2001. Instead, the work was completed and certificate of completion issued on 24/12/2001, which meant the contractor lost 305 days. He stated that 20 years later, the project he built is still working.
117. Upon being issued with the certificate of completion, the Contractor compiled the final financial/account report and forwarded it through a letter dated 10/12/2001 to the Project Manager asking to be paid the value of compensating events which amounted to Kshs. 97, 176,206.00. He said the said letter was received by the employer on 11/12/2001. He stated that there were fourteen compensating events identified in the Contractor’s final account report.
118. This amount was not paid to Binlaw Construction by the employer. On the contrary, the employer decided to charge Binlaw Construction Company Limited liquidated damages for delaying completion of the work. Binlaw Construction Limited insisted it was the employer who contributed to the delay.
119. Consequently, Binlaw Construction invoked clause 25 of the Contract on adjudication and wrote to the adjudicator Engineer D.J.O Fitzgerald on 27/3/2002 to resolve the dispute. Engineer Josephine Musyoki and the late Engineer S.M Osiro received the copy that was copied to the El nino Project Emergency Unit.
120. He explained the issue the Contractor wanted the adjudicator to resolve as follows:
- “...The employer had decided to charge us liquidated damages for delaying completion which we disputed because they are the ones who had caused us to delay. We also complained about value of compensating events to us which was 97,176,206.00...”
121. He stated that the employer also submitted his position to the adjudicator and served the contractor as well.



122. He testified that the final decision of the adjudicator was made on 24<sup>th</sup> May, 2002 and described what it contained as follows:
- “...the adjudicator had awarded liquidated damages on 165 days against the contractor at 0.05% of the contract price per calendar days. The adjudicator had awarded the contractor 97,176,206. It was to attract 28% interest P.A. if not paid within 28 days of the ruling of the adjudicator. We were charged this money which amounted to 2.96 million liquidated damages that was deducted from money which was to be paid from the employer. The employer did not pay us Kshs. 97,176,206 which he was required to pay us...”
123. He explained that the employer did not contest the adjudicator’s decision on appeal, instead it was the contractor who appealed against the decision to charge liquidated damages. He said:
- “...The only dispute the contractor had was he was unhappy to charge liquidated damages because he felt strongly he was unfairly punished. We appealed against that decision to charge us liquidated damages by asking the arbitrator to look at our dispute... We appealed to arbitrator as directed by clause 25 of the conditions of the contract...”
124. Before the arbitrator, the El nino Project Emergency Unit side (or the employer) was represented by Engineer Josephine Musyoki (PW 3), Engineer David Olwenyo (PW 5) and Engineer Peter Mangiti who did not testify. The contractor on the other hand was represented by the 1<sup>st</sup> accused, Engineer John Moguche Zachariah and Joachim Wafula. The arbitrator was Joseph Theophil Thuo.
125. The arbitrator gave his decision on 31<sup>st</sup> October, 2002 which the witness went and collected after being notified about it through a letter. According to the accused, the arbitrator upheld the decision of the adjudicator. He explained:
- “... the claim by the contractor of 97,176,206 succeeded. The employer succeeded in that the contractor was supposed to pay damages which they paid themselves...”
126. The employer did not pay and because the 30 days which the arbitrator had given were about to lapse, he wrote the letter of 27<sup>th</sup> November, 2002 to the employer. He however noted that by then, El nino Emergency Project had been wound up hence the letter was addressed to P.S. Provincial Administration & Internal Security as this unit had been operating under the Office of the President. He expounded thus:
- “...the reason why this letter was written was to request for payment of Kshs. 97,176,206 following the final award on 31/10/2002...”
127. He testified that no payment was received in spite of the letters and consultative meetings held to discuss the issue.
128. The contractor thus decided to seek court’s intervention to enforce the arbitrator’s final award. That was in April, 2009. He obtained the decree to get payment of Kshs. 97, 176, 206 through the High Court Miscellaneous Application Number 237 of 2009.
129. That decree was served and received but the employer neither contested it nor paid the amount.



130. The Contractor then took a further step to seek enforcement through judicial review by filing a judicial review application number 41 of 2010. That however did not materialize for the reasons he stated as follows:

“...while we applied for judicial review to enforce the award in no. 41/2010, it was to be heard on 5/3/2010. That is when somebody from EACC, Mr. Muraya accompanied by I.O shouted in court that the orders received from the High Court were based on forged documents and they had original documents to counter the orders we were seeking payment for...”

131. He insisted that the witnesses from the employer’s side namely PW 2, PW 3 and PW 5 who said they were unaware of the award of Kshs. 97,106,276 were not truthful. He stated:

“...In their testimony, all witnesses drawn from employer PW 2, PW 3 and PW 5 all of them denied the existence of a demand to pay Kshs. 97,106,276. They actually lied under oath...”

132. When his Advocate showed him P. exhibit 1 (b) which the Prosecution witnesses had testified was the genuine final award that had been made by the arbitrator Mr. Theophil Thuo he replied:

“... It is not the final award I received from Engineer Theophil Thuo. It did not come from arbitration because the arbitrator does not give different documents. It is very unlikely that he could have given two different documents. I do not know Engineer Thuo to be a person who could do such a thing. This document does not conform to the reality that took place in the arbitration process...”

133. Asked what was his position about the charges he is facing in Court, he stated:

“...There was nothing against me, many of the witnesses lied under oath. EACC raised claims which they could not substantiate. Witness like Muthoni Kimani confirmed that they do not care about court orders, that they can act even on allegations of the Investigating Officer. Others like the I.O. said they were taking orders to initiate this Prosecution yet EACC is independent which should not take orders from anybody. Nobody brought credible evidence against me...”

134. He insisted that the Contractor still has orders which have never been set aside and are still in force yet he is being prosecuted with EACC acting as though it was law unto itself.

135. He further stated that he has been discriminated because he is the only Director who has been charged yet the Company had other Directors. He saw the prosecution that targeted him and the Company as aimed to causing him economic ruin which has been achieved as the Government cannot give him any work if he has a pending litigation against it.

136. On cross-examination by Ms. Emily Kamau for the Prosecution, the accused was confronted with the testimony of PW 2, Redempta Ngáng’a who served as the Secretary to the arbitrator Theophil Thuo and informed that she had confirmed typing the award and also witnessing Mr. Theophil Thuo’s signature in P. exhibit 1 b, and that was the only arbitration award she knew of; the accused responded:

“...I heard her say that. She was in favour of P. exhibit I (b)...”

137. He was then reminded that P. exhibit 1 (b) does not have the figure of Kshs. 97,176,206; he responded:

“...In P. exhibit 1 (b) it doesn’t have...”



138. It was also put to him that PW 2- Redempta Ng'ang'a denied typing the arbitration award that he had used in filing the application for enforcement of the arbitration award in the High Court. He answered:
- “...She stated so...”
139. He was also reminded that the document examiner had confirmed the signatures in P. exhibit 1 (b) to be similar to the known and specimen signatures of Engineer Joseph Theophil Thuo and Redempta Ng'ang'a; he conceded that that was so.
140. He further confirmed that he did in fact swear the affidavit in support of the application before the High Court- P. exhibit 30 as well as the verifying affidavit dated 12/4/2010 to support his claim for payment of kshs. 97,176,206. He answered when the question was put to him:
- “...Yes, they were my supporting documents...”
141. I have looked at the rival submissions filed by the prosecution and the defence in this case. It is not the intention of the Court to reproduce verbatim the parties' submissions, instead the court will make reference to the said submissions where applicable in arriving at its findings.
142. To begin with, I would like to concur with the Prosecution's submissions that despite the defence giving a detailed account of how the contract to rehabilitate Mt. Elgon Water Supply and Sanitation facilities, namely, contract number EIRP/WSS/PW 30 was entered into, beginning with advertisement, tendering, the issuance of letter of notification and actual contract signing on 5/5/2000; all these aspects of contracting processes are not what is in issue before me in this case. Moreover, it is also important to add that this Court is also not dealing with how the parties fulfilled their obligations under the contract since any dispute arising out of the performance of the said contract had its own dispute settlement mechanism through adjudication and arbitration.
143. What this Court is required to determine is whether the prosecution has proved beyond reasonable doubt that the genuine arbitration award issued by the arbitrator was falsified in the manner particularized in the charge sheet, that the said false document was also uttered with the knowledge of the accused to file for enforcement proceedings and that the intention was to defraud the Government the amount contained in the said false award; this sums up the three offences of:
- a) The offence of making a false document contrary to section 345 as read with section 347 (b) and section 349 of the Penal Code Cap 63 Laws of Kenya
  - b) The offence of uttering a false document with intent to defraud contrary to section 353 of the Penal Code Cap 63 Laws of Kenya, and;
  - c) Attempt to commit a corruption offence contrary to section 47A (1) of Anti-Corruption & Economic Crimes *Act No. 3 of 2003* or in the alternative, Attempt to obtain by false pretences contrary to section 315 of the Penal Code, Cap 63 Laws of Kenya.
144. There is unanimity by both the Prosecution and the defence that at one point, a dispute between them went to adjudication and eventually arbitration as per the terms of the contract.
145. That dispute was determined by the adjudicator but because the Contractor was dissatisfied with the adjudicator's decision to charge him liquidated damages, he went for the second tier in the dispute resolution mechanism under the contractual terms which was a reference to a single arbitrator. The matter thus went before Engineer Joseph Theophil Thuo who gave his decision on 31<sup>st</sup> October, 2001.



146. It is the outcome of this arbitration award by Engineer Joseph Theophil Thuo that these criminal charges against the accused are founded.
147. The main issue in this trial whether the genuine arbitration award issued by Engineer Joseph Theophil Thuo was altered to falsely reflect a sum of Kshs. 97,176, 206.00 as payment for compensating events in favour of contractor.
148. It was also the prosecution case that the accused filed for enforcement proceedings using the invalid award and attempted to recover huge figure of 97,176, 206 plus interest from the Government through the court process yet this figure never featured in the true arbitration award that was made by the arbitrator.
149. This of course was denied by the accused who insisted the documents he used in filing for enforcement of the award were those that he received from the arbitrator. He castigated prosecution witnesses for lying under oath.

The question therefore is, was the arbitration document used by the accused to file for court proceedings for enforcement of the award false or not?

150. Under section 345 of the Penal Code Cap 63 Laws of Kenya, forgery is defined as “the making of a false document with intent to defraud or deceive.”

Section 347 (b) thereof provides:

“Any person makes a false document who-

- b) alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document”

151. The arbitration award that was used by the accused is the one which was in the court file. It was produced in this case as P. exhibit 2. The said Court file was produced by the Court Executive Officer who was in charge of Milimani High Court Commercial Court Division Antony Mbiyu Kamuyu (PW 9) as P. exhibit 17. It is Misc. Civil Application Number 237/2009.
152. The Prosecution witnesses who participated in the arbitration process, compiled and presented the defence on behalf of El nino Emergency Project Unit/ Government before Arbitrator Joseph Theophil Thuo were Engineers Josephine Musyoki (PW 3) and David Olwenyo who were categorical that the issue of compensating events of Kshs. 97, 176, 206 did not arise in the arbitration proceeding between El nino Emergency Rehabilitation Project and Binlaw that was held before Engineer Joseph Theophil Thuo.
153. PW 2- Redempta Ng’ang’a, who was the Secretary to the Arbitrator Joseph Theophil Thuo who was reflected in the arbitration award relied on by the accused to file for enforcement proceedings (P. exhibit 2) as having been the one who signed as a witness to Joseph Theophil Thuo signature in the said document- P. exhibit 2 disowned the signature in the said document. She also said the signature on P. exhibit 2 purporting to be Mr. Thuo’s signature was also not Mr. Thuo’s signature.
154. This evidence of Redempta Ng’ang’a (PW 2) was further boosted by the evidence of the document examiner who upon examining her specimen signatures and comparing them with those in the arbitration award that had been used by the accused to file for enforcement of the award (P. exhibit 2) found that there were disparities between them and was thus in his expert opinion, it was not her signature. The same finding was reached when he examined the signature of the Arbitrator Mr.



Joseph Theophil Thuo against his specimen signatures and those that had been taken from him by the investigating officer and the known signatures provided.

155. Besides this particular aspect, the investigating officer further produced in evidence the arbitration award (P. exhibit 1 b) that had been forwarded to the Pending Bills Closing Committee from El nino Emergency Project Offices when the accused lodged his claim for payment of Kshs. 97,176, 206 before the Pending Bills Closing Committee. Redempta Nyokabi Ng'ang'a (PW 2) confirmed that she typed for the arbitrator the said P. exhibit 1 (b) and even signed as a witness thereof after the arbitrator appended his signature on the document- P. exhibit 1 (b). The same was also in agreement with the copy which had been obtained by the Investigating Officer from the arbitrator when he went to interview him in his office- P. exhibit I (c).
156. Although the defence in its submissions amplified the fact that the arbitrator was not called to testify in this case; the issue of the arbitrator's incapacity to testify was exhaustively dealt with by this Court in an earlier ruling it delivered on 8<sup>th</sup> April, 2019 on admissibility of documentary evidence that were recovered from the arbitrator.
157. The issue of his failing state of health and incapacity to testify was brought to the attention of this Court by the Prosecution which applied to be allowed to produce, through the Investigating Officer, a copy of the arbitration award that the Investigating Officer had recovered from the said arbitrator at the time he interviewed him and recorded his statement from the arbitrator's office by which time by the arbitrator's health was sound.
158. His health condition at the point that he was expected attend court to give his testimony was extremely poor. The Prosecution informed the Court that he could not be able to testify. The defence opposed any attempt to produce the documents which the investigating officer had recovered from the arbitrator during investigations terming them inadmissible hearsay since the arbitrator had not been called to authenticate them.
159. In the ensuing push and pull between the Prosecution and the defence on this issue, the court ordered for an independent medical assessment of the arbitrator and thereafter invited both parties to make submissions.
160. The arbitrator was examined by a team of six doctors from Kenyatta National Hospital who filed the report dated 27/2/2019 before the court. The doctor's report was that the proposed witness was suffering from a very serious ailment that had serious impact on his nervous system affecting his brain function, his ability to speak and even mobility to the extent it was not feasible for him to testify in court. The report by six medical experts from Kenyatta National Hospital was availed in Court on 28/2/2019.
161. The Court considered this report and submissions of both the defence and the prosecution on this issue and found that the incapacity of the arbitrator to testify had been demonstrated to the satisfaction of the court. It invoked section 33 (b) of the *Evidence Act* on exceptions to hearsay rule in so far as it relates to 'records kept in the ordinary course of business in discharge of professional duty' and found that such documents can be shown to be from proper custody or where they can be vouched for by a credible witness who is aware of their existence, they are admissible in evidence notwithstanding the inability of their maker to testify.
162. The court went ahead and excluded the statement of the arbitrator recorded by the investigating officer that day as this was made in the course of arbitrator's professional undertaking as an arbitrator. It however admitted into evidence 'any statement, reports or records that Engineer Joseph Theophil



Thuo made in the course of his profession or occupation as an arbitrator as long it was relevant to these proceedings.”

163. This finding thus explains the receipt into evidence of the copy of the arbitration award P. exhibit 1 (c) which the arbitrator provided to Investigating Officer to counter - P. exhibit 2 that had been retrieved from the Court file.
164. The arbitrator’s file copy- P. exhibit 1 (c) which the Investigating Officer obtained from the arbitrator when he went to interview him at his office is similar to the one that had been forwarded to the Pending Bills Closing Committee from the El nino Emergency Project Unit/employer- i.e. P. exhibit 1 (b).
165. The two documents P. exhibit 1 (b) and 1 (c) were analogous but when compared with the contents or style of P. exhibit 2 with what had been used to file for enforcement proceedings before the High Court in Misc. Application Number 237 of 2009(P exhibit 17), there were glaring disparities. For instance, P. exhibit 2 had been typed using different font compared to P. exhibit 1 (b) & 1 (c).
166. Whereas the issues in P. exhibit 1 (b) were numbered sequentially up to Roman VII, with Roman IV being split to i & ii; those in P. exhibit 2 all numbered chronologically up to Roman, (ix); number iv was not split into two as in P. exhibit 1 (b).
167. Most sensationally, P. exhibit 2 introduced into the award a figure of Kshs. 97,176,206 for compensating events which was not in P. exhibit 1 (b).
168. The above evidence clearly demonstrates that although the accused claimed that prosecution witnesses lied under oath the view of this court going by the evidence on record is quite different. On the contrary that conclusion can only apply to him in view of the above facts. The court does not believe that the accused actually obtained from Engineer Theophil Thuo, the arbitration award he used before the High Court- P. exhibit 2 to file proceedings for enforcement considering the evidence reviewed above.
169. The arbitration award that was used in Court-P. exhibit 2 was not a genuine award that originated from the arbitration proceedings that were conducted by Engineer Joseph Theophil Thuo between El nino Emergency Project and Binlaw Construction Company Limited. Mr. Thuo’s secretary Redempta Ng’ang’a (PW 2) disowned the signature which was on P. exhibit 2 purporting that she witnessed Mr. Thuo’s signature in the said document.
170. The document examiner confirmed her assertion and even went further to demonstrate that it was not Mr. Thuo’s signature after comparing what was in P. exhibit 2 with specimen signatures taken from Mr. Thuo as well as with his known signatures.
171. On the strength of the foregoing evidence therefore, it is the finding of this court that the arbitration award used by the 1<sup>st</sup> accused before the High Court (P. exhibit 2) was not the valid or genuine arbitration award issued by Engineer Joseph Theophil Thuo. The document P. exhibit 2 is false.

The next question then becomes, is the 1<sup>st</sup> accused responsible for making of the false arbitration award- P. exhibit 2 that was purported to have been made by Engineer Joseph Theophil Thuo and which was altered to show that Binlaw Construction Company was awarded a sum of Kshs. 97,176,206 with interest at 28% per annum being the sum due to compensating events?

172. Before I address this question, the 1<sup>st</sup> accused raised as part of his defence he was being discriminated by the Prosecution because the Company had other Directors but they were not charged, that he was the only one singled out for prosecution to be charged jointly with the Binlaw Construction Company Limited.



173. It is not in dispute that the 1<sup>st</sup> accused was cog that moved this arbitration process on behalf of Binlaw Construction Company Limited. He was in fact the initiator of this process going by the correspondence exchanged. The involvement of the other Directors in the entire process is not there at all, not even by way of a Directors resolution.

Under section 23 of the Penal Code, where an offence is committed by any Company or body corporate ‘... every person charged with or acting in control or management of the affairs of such company or body corporate shall be guilty of that offence and be liable to be punished accordingly unless it is proved through no act or omission on his part, he was not aware that offence was being or intended or about to be committed or that he took all reasonable steps to prevent the commission’

174. Simply put, officers and directors cannot be held culpable for crime of a company just because of their status only. They can be exonerated if it is clear that they were unaware of the offence. In his defence before the court, the 1<sup>st</sup> accused seemed to suggest that for fairness, other Directors ought to have been charged. There is no evidence on record gathered by the investigator that links other Directors to the acts complained of, not by any correspondence or even a collective resolution by these Directors. The allegation that the accused is being discriminated because no other director was charged is therefore in the circumstances of this case lacking in merit.

175. What is vividly clear in these proceedings is that it is only the 1<sup>st</sup> accused who was an active participant. The role played by other Directors is not evidenced at all.

176. Having been a core insider in the entire process of arbitration from the initiation to the end, the fact that he subsequently started a court process where a false arbitration award was used to enforce the award instead of the genuine one given by Engineer Joseph Theophil Thou is clear that there was dishonesty on the part of accused as an individual since he was fully aware of the existence of the valid award. The court must draw the inference that he was actually the perpetrator behind the falsification of the arbitration award to effect a fraudulent purpose.

177. I am satisfied that the prosecution has proved beyond reasonable doubt the offence of making a false document contrary to section 345 as read with section 347 (b) and 349 of the Penal Code and thus convict the 1<sup>st</sup> accused in count 1 accordingly.

The 2<sup>nd</sup> count is uttering a false document.

178. The point to determine is here is whether the prosecution has succeeded in establishing the offences of uttering false documents contrary to section 353 of the Penal Code. That is, if on 7<sup>th</sup> April, 2009, the accused knowingly uttered a false document, namely, the arbitration award purported to have been issued to Binlaw Construction Company Limited by Engineer Joseph Theophil Thuo to Deputy Registrar, High Court of Kenya in Nairobi Commercial Courts, Miscellaneous Civil Application Number 237 of 2009.

179. Under section 353 of the Penal Code, it is an offence to knowingly and fraudulently utter false document. The word ‘utter’ is defined in section 2 of the Penal Code to mean:

“Using or dealing with and attempting to induce any person to use or deal with or act upon a document or thing in question.”

Section 353 of the Penal Code reads:

“A person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.”



180. Arising from the reading of section 353 of the Penal Code above, it is obvious that to prove the offence, the prosecution must establish the following three elements:
- 1) That the document is false.
  - 2) Knowledge by the person uttering i.e.(the accused) of its falsity, and;
  - 3) He/she uttered it fraudulently i.e. the intention of deceptively making the other person act on it.
181. Already, the Court has found that the arbitration award-P. exhibit 2 that was used by the accused to file for enforcement proceedings before the High Court was false.
182. Uttering a document is not strictly speaking restricted to mere physical presentation of a document as the definition which I have alluded to in the penal code confirms. It encompasses ‘using’ or ‘dealing’ with the document. Since “uttering a document” is therefore not restricted to only the physical presentation, the court must evaluate the circumstances to determine if the said document was used or dealt with by the accused with the intention to deceptively make another person act on it and thus ‘uttering it.’
183. The evidence by the prosecution was that the arbitration award-P. exhibit 2, found in the court file (P. exhibit 17) in support application for enforcement was false. This court has already made this finding in regard to P. exhibit2. The accused does not deny filing Miscellaneous application number 237/2009-P. exhibit 17 and relying on the said document, P. exhibit 2 and all the other pleadings in the said file. In any case, when the signature in the replying affidavit and verifying affidavit was examined against his specimen signature by the document examiner it was found to be similar and indistinguishable with his signatures.
184. The 1<sup>st</sup> Accused thus used or dealt with a false arbitration award knowingly since as earlier found by this court, he had fully participated in the entire process and was aware of the true findings made by the arbitrator, in using or dealing with the said false arbitration award, he was deliberately hell bent to deceive the court by using fake document to file for the enforcement. The second count is proved beyond reasonable doubt. I find him guilty of the offence of uttering false document as charged in count 2.
185. He did this to benefit this to benefit the Binlaw Construction Company Limited in which he was the managing Director. The crimes were committed for the direct benefit of the company which makes the Company criminally culpable too. I find the Company guilty of this count as well.
186. Lastly, the court needs to determine whether or not the offence of attempting to commit a corruption offence contrary to section 47A (1) of the Anti-Corruption & Economic Crimes Act, 2003 has been proved or not?
187. The issue being whether the accused attempted to commit an offence of corruption, namely fraud, by attempting to obtain from Permanent Secretary Ministry of Special Programmes Kshs. 294,443,904 by falsely pretending that the arbitration award that they relied on to secure a court decree at the High Court Misc. No. 237 Of 2009 was a valid arbitration award issued by Engineer Joseph Thuo, a fact they knew to be false.



Section 47 A (1) of the Anti-Corruption Act and Economic Crimes [Act, No. 3 of 2003](#) deals with attempts, conspiracies, etc. At section 47 A (1) it states:

“A person who attempts to commit an offence involving corruption or an economic crime is guilty of an offence”

188. An attempted crime is an offence that is not completed. The failure may be contributed to by either of the following reasons:
- a) The accused could have done everything he purposed to achieve but nevertheless fail despite having put everything in motion, for instance where one decides to commit a criminal act of murder, buys the gun, waylays the victim but when he shoots, he misses the target. This will amount to what is commonly referred to as a “complete attempt” since all the actus reus of the crime was executed but for the intervention of God or nature.
  - b) The second aspect is where the perpetrator goes ahead and undertakes steps needed to finish the offence but is stopped from succeeding or decides to quit after setting in motion steps towards commission of that crime. For example, the accused buys the gun, visits the victim’s homestead, points the gun but decides not to pull the trigger or is prevented from completing the crime by an intervening circumstance such as the sudden arrival of rescuers.
189. In the instant case, the accused was hell bent on using the false arbitral award to seek fraudulent payment from the Government. His attempt to do so did not end at making the demand from the Permanent Secretary Ministry of Special Programmes as can be seen in P. exhibits 33-letter ref. number ENEP/PW 30/BCCL/MD/126 or that of his Advocate V.K Githinji ref. VG/BCL/240/09 of 5/1/2010- P. exhibit 9. He went beyond this to outrageously file a judicial review application number 41 of 2010 to compel the payment of the said fraudulent payment from the Government. The Office of Attorney General had even swallowed the accused deception hook, line and sinker on being served with court decree and was prevailing upon the Permanent Secretary, Ministry of State for Special Programmes to settle the fraudulent claim as the its letter dated 21/1/2010- P. exhibit 10 before the truth was unearthed by KACC investigators and the Attorney General’s Office made a quick about turn and promptly withdrew the said instructions as per P. exhibit 11.
190. If it was not for that small window of opportunity that came through and revealed the fraudulent scheme that the accused had so meticulously executed, the accused would have laughed all the way to the bank having succeeded in defrauding the public of huge resources.
191. In my view, the accused determination to defraud the Government the of Kshs. 294,443,904 using a fraudulent decree obtained from a forged arbitral award was only stopped by this intervening circumstance.
192. On the basis of this evidence therefore, the court is satisfied that the offence of attempt to commit a corruption offence, namely fraud, contrary to section 47A (1) of the [Anti-Corruption and Economic Crimes Act](#), No. 3 of 2003 has been established against the accused beyond reasonable doubt and convicts the 1<sup>st</sup> accused. In addition, since the offence was meant to benefit the 3<sup>rd</sup> accused too, I also find the Company guilty of this offence as well.
193. Consequently, the 1<sup>st</sup> accused is found guilty in count 1 and convicted under section 215 of the Criminal Procedure Code. Both the 1<sup>st</sup> and 3<sup>rd</sup> accused are convicted in counts 2 & 3 under section 215 of the Criminal Procedure Code.



194. The 2<sup>nd</sup> accused was acquitted under section 210 of the Criminal Procedure Code for reasons given at the case to answer stage.

**JUDGMENT READ IN OPEN COURT THIS 16TH DAY OF OCTOBER, 2020**

**L.N. MUGAMBI**

**CHIEF MAGISTRATE**

